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May 5, 1997

VIA HAND DELIVERY


Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Caton

On behalf of Heftel Broadcasting Corporation, there are herewith submitted an original and four (4) copies of its Comments in response to the Notice of Proposed Rule Making and Order to Show Cause issued by the Chief of the Allocations Branch on March 14, 1997 (MM Docket No. 97-91; RM-8854).

Please address any inquiries regarding this matter to the undersigned counsel.

Sincerely


Lawrence N. Cohn

Enclosures

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MAY 5 1997

FEDERAL COMMUNICATIONS COMMISSION
BEFORE THE OFFICE OF SECRETARY DOCKET FILE COPY ORIGINAL

Federal Communications Commission

In the Matter of)
)
Amendment of Section 73.202(b),) MM Docket No. 97-91
Table of Allotments,) RM-8854
FM Broadcast Stations.)
)
Lewisville, Gainesville, Robinson,)
Corsicana, Jacksboro, and)
Mineral Wells, Texas)

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

COMMENTS

HEFTEL BROADCASTING CORPORATION

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Its Counsel

May 5, 1997

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Summary

Heftel Broadcasting Corporation ("Heftel") filed the Petition for Rule Making which resulted in the Commission issuing the Notice of Proposed Rule Making ("NPRM") to which these Comments are addressed. Heftel's proposal would result in a modification of the FM Table of Allotments in six communities in Texas. Heftel's proposal would result in a preferable reallocation of FM allocations because it would provide a first local service to Lewisville (population 46,521) and first local service to Robinson (population 7,111). In addition, Heftel's proposal would provide a net increase of service to more than 2.7 million people.

To obtain the clear benefits that would be provided by Heftel's proposal it is not necessary to reduce service to any areas in need of service. The current communities of license of the stations which would be reallocated to Lewisville and Robinson (i.e., Station KECS (CP only) in Gainesville, and Station KICI-FM in Corsicana, respectively) would both retain at least one full-time station. Moreover, all the areas which would lose service as the result of the reallocation of the Gainesville and Corsicana stations would continue to receive at least five full-time aural services.

Heftel's proposal is inconsistent with the pending application of Snyder and Associates, Inc. ("Snyder"), licensee of Station KYXS-FM, Mineral Wells, Texas, to change its operation from Channel 240C3 to 240C1 (as allotted). While the Snyder proposal would increase the number of persons served by Station KYXS-FM by approximately 360,000, this is a small fraction of the number of persons who would receive additional service if Heftel's proposal were implemented. Moreover, all of Snyder's proposed increase service area currently receives service from at least five stations. Snyder's proposal would not provide a new service to any community. Accordingly, the Heftel proposal is clearly superior to the Snyder proposal under established Commission FM Priorities 3 and 4.

Heftel requests that the Commission adopt the changes in the FM Table of Allotments as proposed in the NPRM.

BEFORE THE

Federal Communications Commission

In the Matter of)	
)	
Amendment of Section 73.202 (b),)	MM Docket No. 97-91
Table of Allotments,)	RM-8854
FM Broadcast Stations.)	
)	
Lewisville, Gainesville, Robinson,)	
Corsicana, Jacksboro, and)	
Mineral Wells, Texas)	
To: Chief, Allocations Branch		
Policy and Rules Division		
Mass Media Bureau		

COMMENTS

Heftel Broadcasting Corporation ("Heftel"), parent of the permittee of Station KECS(FM), Gainesville, Texas, and of the licensee of Station KICI-FM, Corsicana, Texas, by its counsel, hereby submits these Comments in response to the Notice of Proposed Rule Making and Order to Show Cause (DA 97-489) ("NPRM") in the above-captioned proceeding which was issued by the Chief of the Allocations Branch on March 14, 1997. Heftel filed the Petition for Rule Making ("Petition") which led the Commission to issue the NPRM, and it hereby incorporates by reference the proposal advanced in the Petition. Heftel urges the Commission to adopt the changes in the FM Table of Allotments (Section 73.202 (b) of the Commission's Rules) proposed in the Petition and which

are set forth in Paragraph 10 of the NPRM. In support, Heftel states as follows:

I. Background

Heftel demonstrated in the Petition that its proposal^{1/} would result in a preferential arrangement of allotments in accordance with the Commission's FM allotment priorities.^{2/} The benefits of the Heftel proposal were stated as follows: (1) allotment of a first local aural service to Lewisville, Texas (1990 U.S. Census population of 46,521); (2) allotment of a first local service to Robinson, Texas (1990 U.S. Census population of 7,111); (3) a net increase in total population served by Station KECS, currently assigned to Gainesville, Texas, and Station KICI-FM, currently assigned to Corsicana, Texas, of more than 2½ million people^{3/}; and

^{1/} Heftel's proposal would make the following changes in the FM Table of Allotments in Texas communities: (1) delete Channel 300C2 from Gainesville (KECS, CP only for Channel 300C3) and add Channel 300C1 at Lewisville; (2) delete Channel 300C1 from Corsicana (KICI-FM) and add Channel 300A to Robinson; (3) delete Channel 299A at Jacksboro (CP only) and substitute Channel 237A; and (4) delete Channel 240C1 at Mineral Wells (KYXS-FM, operating on Channel 240C3), and substitute Channel 240C3.

^{2/} The FM allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters, with co-equal weight given to priorities (2) and (3). NPRM, ¶ 2, n.1.

^{3/} See footnote 10, below.

(4) an increase in the number of Hispanics served by Spanish language programming by more than 400,000.^{4/}

The Petition also demonstrated that Heftel's proposal would not significantly reduce service to underserved areas. According to the engineering statement supplied with the Petition, none of the areas that would lose service as the result of the proposed channel reallocations is "underserved," and all of such areas would continue to receive at least five full-time aural signals. See Sorensen Technical Statement, p. 3 and Figure E-6. Moreover, if the Heftel proposal were effectuated, the two communities which would lose allocations would retain full-time local aural service. Gainesville would retain two full-time local aural stations (i.e., Stations KDGE(FM) and KGAF(AM)), and Corsicana would retain one full-time local aural station (i.e., Station KAND(AM)). Petition, p. 2, and NPRM, ¶¶ 3 and 4.

Heftel contended that, on balance, its proposal would be a preferable arrangement of FM allocations because the public interest benefits to be derived from achieving first aural service

^{4/} Heftel, through subsidiaries, owns and operates Spanish language radio stations in the following markets (among others): New York City, Los Angeles, Miami, Chicago, San Antonio, Houston, Dallas, and El Paso. Heftel noted in the Petition that it plans for Station KECS to broadcast in the Spanish language, and estimated that the proposal to reallocate Channel 300 from Gainesville to Lewisville would bring this specialty programming format to more than 400,000 Hispanics. See Petition, p. 5 and footnote 9.

to Lewisville and Robinson (both qualifying as FM Priority 3), together with the substantial net increase in total population served by the allotments (FM Priority 4), far outweighed the loss of a third service in Gainesville (1990 U.S. Census population of 14,256) and the loss of a second service in Corsicana (1990 U.S. Census population of 22,911) (both FM Priority 4).

The benefits to the public of Heftel's proposal remain essentially valid and fully justify approval of the allotment plan proposed by the Commission in the NPRM. Heftel takes this opportunity to correct an error in its Petition, to comment on various matters which the Commission asked it to address in the NPRM, and to discuss the significance of one development which has occurred since the filing of the Petition.

II. The Proposed Allotment to Robinson, Texas Should Be Accorded a "First Local Service Preference."

Heftel contended in its Petition that the proposed allotment of Channel 300A at Robinson should be considered as a first aural service preference for purposes of the FCC's allotment priorities. However, in Paragraph 4 of the NPRM, the Commission noted that the proposed Robinson allotment would provide 70 dBu coverage to 70%

of the Waco Urbanized Area,^{5/} and requested that Heftel submit information in support of the position that the proposed allotment to Robinson is entitled to consideration as a "first local service preference" under established FCC allotment precedent (i.e., RKO General (KFRC), 5 FCC Rcd 3222 (1990), Faye and Richard Tuck, 3 FCC Rcd 5374 (1988) ("Tuck"), and Headland, Alabama, and Chattahoochie, Florida, 10 FCC Rcd 10352 (1995)).

In determining whether a proposed allotment to a suburban community which is near a larger community is deserving of consideration as a "first local service preference," the Commission attempts to determine whether the smaller community is "interdependent" with the larger community. The Commission considers, among other factors, the populations of the two communities and the distance between the communities. See Tuck, 3 FCC Rcd 5374, at 5378. According to the 1990 U.S. Census, the population of Robinson is 7,111, and the population of Waco, Texas is 103,590. Heftel's consulting engineer, Robert du Treil, Sr., has determined that the Robinson reference point is 9.6 kilometers from the Waco reference point. See Attachment 1, Technical Exhibit of Robert du Treil, Sr., p. 3.

^{5/} Based on the analysis of its consulting engineer, Heftel concurs with the Commission's conclusion that a station on Channel 300A operating at the hypothetical Robinson reference point would place a 70 dBu contour over approximately 70% of the Waco Urbanized Area. However, see Section IV, below.

The Commission has also identified eight other factors which bear on the "interdependence" issue. See, e.g., Tuck, 3 FCC Rcd 5374 at 5378.^{6/} In response to the Commission's request for information bearing on the factors identified in Tuck, Heftel has engaged Jane Gilmore, a consultant associated with the law firm of Cohn and Marks, to investigate the relationship between Robinson and Waco. She has prepared a report addressing this subject and it is supplied as Attachment 2 hereto. Gilmore's report provides the following information regarding the eight factors identified in Tuck:

^{6/} The Commission stated the following:

In assessing the interdependence of the specified community with the central city, we will consider the following characteristics: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own newspaper or other media that covers the community's local needs and interests; (3) whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facilities, and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan area for various municipal services such as police, fire protection, schools, and libraries.

Factor 1. Although most of the residents work in Waco, 146 households earn farming self-employed income.

Factor 2. Robinson does not have its own newspaper (or radio station). There is a weekly insert in the Waco Tribune called "Neighbor" where local needs and interests are covered and a weekly newspaper, The Hometown News, which is published in Waco but distributed to areas outside Waco.

Factor 3. The Mayor of Robinson, Max Renfro, the City Secretary, Linda Vranich, the President of the Chamber of Commerce, Mary Nell Jarvis, the President of Fidelity Bank of Texas, Pat Whatley, the Superintendent of the Robinson School District, Jim Smith and Woodrow McMullin of McMullin Realtors and Builder all view Robinson as separate and distinct from Waco. (See statements attached to Gilmore Declaration). Robinson's population density (half rural/half urban), as well as its Census Bureau characterization (Extended City), differentiate Waco City (entirely urban and classified as a Metropolitan Area) from Robinson.

There are striking demographic differences between Robinson and Waco. While there are 16,722 Hispanics in Waco (16.1%), there are 464 Hispanics in Robinson (6.5%). Waco has a higher poverty rate

than Robinson. Waco has a higher percentage of households with incomes under \$37,499 (80% v. 55%), and its residents have approximately half the median income of households in Robinson (\$17,852 v. \$38,247). There is a 12.4% housing unit vacancy in Waco while there is only a 4.75% vacancy rate in Robinson. The average cost of a house in Waco is \$80,000 while in Robinson the average cost is \$80,000.

The residents of Robinson spend their time primarily in Robinson, with their families, at school events and related activities. School sports and Little League occupy a considerable amount of the residents' leisure time. The Robinson ISD, with its excellent record of academic achievement by its students and well-supported band and sports teams, are a major attraction to new residents of Robinson.

In the past year, 100 new homes have been built and more are planned. There is a steady demand for two reasons, reasonable cost compared with the rest of mid-Texas and Robinson's school district. There is land available for light industry and city officials are working on ways to attract businesses.

Factor 4. Robinson has its own local government and elected officials--a mayor and a five-member city council. The position of City Administrator is currently vacant.

Factor 5. The Robinson zip code is 76706. Waco has several zip codes, including 76706; however, only a small fraction of Waco is within the 76706 zip code. The Robinson Chamber of Commerce puts out a City Telephone Directory. The Directory is outdated and is currently being updated. Southwestern Bell includes cities which border Waco in the Greater Waco telephone book.

Factor 6. Neither Waco nor Robinson has significant public transportation, and over 90% of the population in both cities drive alone to work. Robinson has a clinic with one general practitioner and three employees which provides emergency and outpatient, non-specialized, services. There is also a dental clinic with three dentists. The major commercial establishments are: Johnson's Roofing (110-132); Blue Bell Ice Creameries (36); and Brookshire Grocery (30-35).

Factor 7. According to Mayor Renfro, people from Waco, and neighboring Hewitt and Woodway, come to Robinson to do some of their shopping, i.e., buying cars. Aside from Waco newspapers, radio and TV ads, advertising by Robinson business is done in

county-wide and state-wide merchandise papers such as the Thrifty Nickel and the Goldmine.

Factor 8. Robinson has a water treatment plant which utilizes a Reverse Osmosis system, a first of its kind in the State of Texas. This water treatment plant was funded through Robinson municipal bonds. Robinson has a 14 member police force and its own volunteer fire department. Robinson's school district consists of five public schools: three elementary, a junior high school, and a high school. The high quality of education received by Robinson students is considered one of the primary attractions for new residents to come to live in Robinson.

Based on the foregoing, Heftel submits that Robinson is not interdependent with Waco, and therefore its proposal to allot Channel 300A at Robinson is deserving of a "first local service preference."

III. Heftel's Proposal Would Produce a More Favorable Table of Allotments than the Pending KYXS-FM Upgrade Application.

Mr. du Treil has reevaluated the increased coverage which would result from the proposed reallocations of Station KECS from Gainesville to Lewisville and of Station KICI-FM from Corsicana to Robinson. Mr. du Treil essentially supports the figures provided by James Sorensen in Exhibit 5 of his Technical Statement

which was included with the Petition. The exception is that, using a more conservative approach, based on the allotment of Station KECS on Channel 300C2 at a hypothetical reference point in Robinson, du Treil has determined that the station would include within its 60 dBu contour 147,106 people residing in an area of 8,508 square kilometers. See du Treil Technical Exhibit, pp. 1-2.

Station KYXS-FM, Mineral Wells, Texas, is licensed to Jerry Snyder and Associates, Inc. ("Snyder"), and currently operates on Channel 240C3 even though the FM Table of Allotments currently specifies Channel 240C1 at Mineral Wells. An essential part of the reallocation proposal advanced by Heftel in its Petition is to change the allotment for Station KYXS-FM from Channel 240C1 to Channel 240C3 at Mineral Wells.^{7/8/}

^{7/} The proposal to add Channel 300C1 at Lewisville is dependent upon deletion of Channel 300C1 from Corsicana. Removal of Channel 300C1 from Corsicana allows the addition of Channel 300A at Robinson. The addition of Channel 300A at Robinson requires the substitution of Channel 237A for Channel 299A at Jacksboro, and the addition of Channel 237A at Jacksboro requires the downgrade of Channel 240 at Mineral Wells from Class C1 to Class C3. See Petition and NPRM, ¶ 1.

^{8/} Channel 240C1 was allotted to Mineral Wells in 1992 at Snyder's request, and Snyder filed a construction permit application to upgrade Station KYXS-FM to the Class C1 allotment. Although Snyder's application was approved by the Commission, Snyder did not construct the Class C1 facility, and its construction permit was deleted by the Commission in December 1993. See NPRM, ¶ 6.

On November 25, 1996, four months after Heftel had filed its Petition (i.e., on July 26, 1996), Snyder filed an application with the Commission seeking to upgrade Station KYXS-FM from Channel 240C3 to Channel 240C1. This application (BPH-961125IG) is currently pending.^{2/} Mr. du Treil addresses the increased coverage which would result from Snyder's proposal to upgrade KYXS-FM from a Class C3 to a Class C1 facility on Channel 240. He concludes that the change would increase the 60 dBu service from the current 63,792 people within 4,348 square kilometers to 421,563 people within 16,297 square kilometers, an increase of 357,744 people within 11,949 square kilometers. See du Treil Technical Exhibit, pp.4-5.

The population gains and losses of the Heftel and Snyder proposals are reflected in the following table:

^{2/} Snyder later filed a Motion asking the Commission to dismiss Heftel's Petition on the ground that, contrary to the contention made by Heftel in the Petition, it (Snyder) did have a continuing interest in the use of Channel 240C1 at Mineral Wells. The Commission rejected this contention, but stated that it would consider Snyder's Motion (and presumably the filing of the KYXS-FM upgrade application) as comments in the context of the rule making proceeding which the Commission initiated at the request of Heftel. NPRM, ¶ 6, n.2. For that reason, Heftel's Comments address the significance of Snyder's application to use Channel 240C1.

	<u>Present</u>	<u>Proposed</u>	<u>Net Gain/(Loss)</u>
<u>Heftel:</u>			
KECS (CP)	147,106 ^{10/}	2,941,838	2,794,732
KICI-FM	255,432	182,085 ^{11/}	(73,347)
Total	402,538	3,123,923	2,721,385

Snyder:

KYXS-FM	63,792	421,536	357,744
---------	--------	---------	---------

Thus, while Snyder's proposal would result in a net gain in population covered of about 360,000 persons, this is only a small fraction of the more than 2,720,000 persons (net) who would receive additional service if the proposal advanced by Heftel were adopted.

Also, and most importantly, du Treil concludes that service to underserved areas is not relevant to a comparison of the Heftel and Snyder proposals. Specifically, (1) all of the area which would lose service as a result of Heftel's proposal would continue to receive at least five (5) aural services,^{12/} and (2) all of the

^{10/} The total population gain figure of 2,868,491 set forth at p. 5 of the Petition did not consider any population "loss" for Station KECS because it is an unbuilt station. As stated previously, the figure 147,106 represents KECS "current" population coverage based on the Class C2 allotment in Section 73.202(b) of the Rules.

^{11/} The figure 133,663 on page 5 of the Petition as the proposed coverage for KICI-FM was in error. See Sorensen Technical Exhibit, Exhibit 5.

^{12/} Mr. du Treil disputes the Commission's conclusion in the NPRM at ¶ 7 that the deletion of the allotments at Gainesville and Corsicana would leave 3,573 persons who currently receive five or more aural services with four aural services, and identifies five
(continued...)

Mineral Wells gain area (i.e., the area which is not now within the station's 60 dBu contour but which would be within the 60 dBu contour if the station operated as proposed in Snyder's pending application for Channel 240C1) currently receives five or more full time aural services. See du Treil Technical Exhibit, pp. 2-3 and 5, respectively.

As demonstrated in the preceding paragraph, insofar as net change in population served is concerned, Heftel's proposal is entitled to a major "plus" vis-a-vis Snyder's proposed use of Channel 240C1 at Mineral Wells (FM Priority 4). This advantage in Heftel's favor is not outweighed by the loss of a second local service in Corsicana (population 22,911) and a third local service in Gainesville (population 14,256) (both FM Priority 4). Since Snyder's proposal would not provide a first local service to any community, while Heftel's proposal clearly would do just that in Lewisville and Robinson, both of which are deserving of credit for "first local service preference," Heftel's proposal is also clearly and substantially superior to Snyder's proposal under FM Priority 3. Since FM Priorities 1 and 2 are not applicable to

^{12/} (...continued)
stations which would provide service to all of the area which would lose service as the result of the deletion of allotments in these communities. See du Treil Technical Exhibit, p. 2. Based on Mr. du Treil's conclusion, Heftel requests that the Commission reassess its assertion that under Heftel's proposal 3,573 persons would receive less than five aural service.

either the Heftel or the Snyder proposals, it follows that Heftel's proposal is, overall, superior to Snyder's proposal and would result in a more favorable allotment than would the proposal contemplated by Snyder.

IV. Heftel's Alternative Proposal.

Based on the information supplied in Section II, above, Heftel believes that the Commission will conclude that Robinson is not interdependent with Waco, and thus the proposal to provide a first local service to Robinson deserves a "first local service preference" (FM Priority 3). However, if and only if, the Commission should conclude otherwise, and to demonstrate its commitment to utilize the proposed Robinson allotment to serve Robinson rather than to serve the larger Waco market, Heftel proposes, as a secondary alternative proposal to the one advanced in the Petition, that the Robinson allotment be circumscribed by the specification of three location reference points to assure that although the Robinson station will provide principal community coverage to all of Robinson, it will encompass less than 50% of the Waco Urbanized Area within the 70 dBu contour. A requirement that the site be located within the following three coordinates will accomplish this objective: (1) 31°26'26" NL, 97°04'04" WL; (2) 31°27'18" NL, 97°02'33" WL; and (3) 31°24'53" NL, 97°02'49" WL. See du Treil Technical Exhibit, pp. 3-4.

V. Heftel Will Reimburse Hunt Broadcasting, Inc. As Required.

Hunt Broadcasting, Inc. ("Hunt") is the permittee of Station KJKB(FM), Jacksboro, Texas. Heftel hereby states its intention and commitment to reimburse Hunt for its reasonable costs incurred in changing the channel of operation of Station KJKB from Channel 299A to Channel 237A in accordance with Commission precedent and as required in the NPRM, ¶ 9.

VI. Heftel Restates Its Intention To Apply for the Proposed Channels in Lewisville and Robinson and To Build the Approved Facilities.

Heftel hereby restates its present intention to apply for Channel 300C1 at Lewisville (for Station KECS) and to apply for Channel 300A at Robinson (for Station KICI-FM) if these channels are allotted by the Commission and, if authorized to do so, it will build the stations promptly utilizing said allotments. See NPRM, Appendix, ¶ 2.


Conclusion

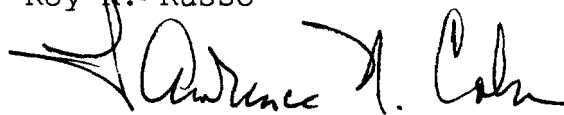
Based on the foregoing, Heftel submits that the proposal advanced in Paragraph 10 of the NPRM would result in a preferential arrangement of allotments and hereby requests that the Commission amend the FM Table of Allotments accordingly.

Respectfully submitted

HEFTEL BROADCASTING CORPORATION

By:


Roy R. Russo


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Its Counsel

Date: May 5, 1997

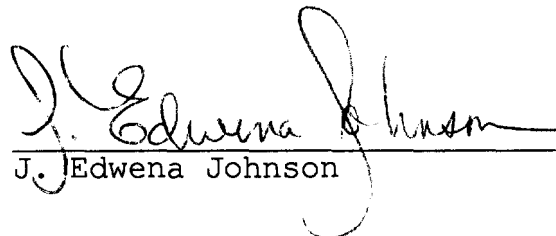
CERTIFICATE OF SERVICE

I, J. Edwena Johnson, hereby certify that a copy of the foregoing Comments was served, via first class postage prepaid mail, upon the parties listed in the following service list this 5th day of May, 1997.

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Englewood, CO 80110
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J. Edwena Johnson

ATTACHMENT 1

TECHNICAL EXHIBIT
PREPARED FOR
HEFTEL BROADCASTING CORPORATION
MM DOCKET NO 97-91
RM-8854

Technical Statement

This statement and attached maps, Figures 1 and 2, were prepared on behalf of Heftel Broadcasting Corporation, petitioner for change in the FM Table of Allotments, 47 CFR 73.202(b) affecting six Texas cities. This exhibit provides information not contained in the original Heftel petition and corrects population and area data associated with the proposed allocation change at Gainesville/Lewisville, TX.

GAINESVILLE/LEWISVILLE ALLOCATION

Heftel holds a construction permit for station KECS(FM) on channel 300C3 at Gainesville. It is proposed to delete the allotted channel 300C2 at Gainesville and in its place to allocate channel 300C1 at Lewisville, Texas. The 60 dBu population and area receiving service from a hypothetical class C2 station operating with maximum facilities from a transmitter site at the reference geographic coordinates listed in the FCC computer database, consists of 147,106 persons in an area of 8,508 square